123-722

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. ~~1072.~~ ~~687 — 379~~ 99

THE MARQUETTE, HOUGHTON AND ONTONAGON RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN.

FILED OCTOBER 13, 1884.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 1072.

THE MARQUETTE, HOUGHTON AND ONTONAGON RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN.

INDEX.

	Original.	Print
Declaration	1	1
Rule to plead	4	2
Plea	5	2
Waiver of jury	6	2
Hearing and submission	7	3
Finding	8	3
Judgment	15	7
Supplemental finding	16	7
Order extending time to settle bill of exceptions	17	8
Exceptions to conclusions of law	18	8
Resolution of board of directors M. H. & O. R. R. Co. Oct. 24, 1883	20	9
Bond	22	9
Assignment of errors	25	11
Citation	27	12
Bill of exceptions	29	13
Petition for writ of error	37	16
Writ of error	39	17
Clerk's certificate	41	18

JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 UNITED STATES OF AMERICA.

The Circuit Court of the United States for the Western District of Michigan, Northern Division.

WESTERN DISTRICT OF MICHIGAN, *Northern Division*, } ss:

The United States of America, plaintiff herein, by Marsden C. Burch, United States district attorney for said district, complains of the *of the* Marquette, Houghton and Ontonagon Railroad Company, defendant herein, (filing the declaration as commencement of suit pursuant to the statute,) of a plea that it renders to said plaintiff the sum of ten thousand dollars, lawful money, which it owes and unjustly detains from said plaintiff, for that whereas heretofore, to wit, on the first day of January, A. D. 1870, and from that time forward to the second day of September, A. D. 1872, The Marquette and Ontonagon Railroad Company was a corporation organized — existing under the laws of the State of Michigan, engaged in the business of operating a railroad in the State of Michigan, and during the year 1871 the income of said Marquette and Ontonagon Railroad Company amounted to a large sum of money, to wit, the sum of six hundred and fifteen thousand and eight dollars and seventy-three cents ($615,008.73), and that after deducting the operating expenses, ordinary repairs, and dividend to stockholders declared during said year, the said Marquette and Ontonagon Railroad Company had on hand at the close of the said year 1871 a large sum of money, to wit, two hundred and forty-nine

2 thousand one hundred and forty-six dollars and sixty-six cents ($259,146$\frac{66}{100}$), which constituted the undivided profits of said corporation which had accrued and been earned and added to the surplus funds of said corporation during said year 1871.

And the said plaintiff avers that said Marquette and Ontonagon Railroad Company thereupon, to wit, on the first day of March, A. D. 1872, at, to wit, Marquette, in said district, became and was liable to pay a tax of two per centum of the net earnings aforesaid for said year 1871 to said plaintiff, by force of the act of Congress entitled An act to reduce internal taxes, and for other purposes, approved July 14th, 1870, and the same became due and owing to said plaintiff, and it became and was the duty of said corporation then and there to pay the same to said plaintiff. And the said plaintiff avers that afterwards, to wit, on the second day of September, A. D. 1872, the said Marquette and Ontonagon Railroad Company and the Houghton and Ontonagon Railroad Company consolidated themselves into a single corporation, under authority of the laws of the State of Michigan, thereby forming and creating the defendant corporation, The Marquette, Houghton and Ontonagon Railroad Company. And the said plaintiff avers that thereupon, to wit, upon the effecting of said consolidation, the said debt attached to and became enforcible against the said defendant, and the said defendant became and was liable to pay said indebtedness to said plain-

3 tiff under the provisions of the State of Michigan, yet the defendant and the said Marquette and Ontonagon Railroad

Company have neglected and refused to pay the debt aforesaid to said plaintiff, although often requested so to do. Whereby and by reason of the said sum of money being and remaining wholly unpaid an action hath accrued to the said plaintiff to have and demand of and from the said defendant the said sum of ten thousand dollars above demanded, to the damage of said plaintiff ten thousand dollars. Therefore suit is brought.

M. C. BURCH,
U. S. District Att'y, Western District of Michigan.

Filed Aug. 22d, A. D. 1881. GAD SMITH,
Deputy Clerk.

4 In the Circuit Court of the United States for the Northern Division of the Western District of Michigan.

THE UNITED STATES
vs.
THE MARQUETTE, HOUGHTON AND ONTONAGON RAILROAD COMPANY.

In filing declaration in this cause pursuant to the statute authorizing the commencement of suits by declaration, and on motion of M. C. Burch, U. S. district attorney, it is ordered that the said defendants appear and plead to said declaration within twenty days after service upon it of a copy thereof, and notice of this rule or judgment, etc.

August 22, 1881. M. C. BURCH,
U. S. Dis'ct Attorney.

5 The Circuit Court of the United States for the Western District of Michigan, Northern Division.

MARQUETTE, HOUGHTON AND ONTONAGON RAILROAD COMPANY
ads.
UNITED STATES OF AMERICA.

The defendant, by W. P. Healy, its attorney, comes and demands a trial of the matters set forth in plaintiff's declaration.

Marquette, Mich., August 25, 1881.

W. P. HEALY,
Defendant's Attorney.

To M. C. BURCH, Esq., *Pl'ffs Att'y.*

Filed Aug. 25, 1881. GAD SMITH,
Dep. Clerk.

6 The Circuit Court of the United States for the Western District of Michigan, Northern Division.

THE UNITED STATES
vs.
MARQUETTE, HOUGHTON AND ONTONAGON RAILROAD COMPANY.

In this cause it is agreed by the attorneys for the respective parties

that said cause be tried by the court without a jury, and that trial by jury is hereby waived.

July 20, 1883.

W. P. HEALY,
Def't's Att'y.
J. W. STONE,
U. S. Att'y, for Plff.

Filed July 20, '83.

GAD SMITH,
Dep. Clerk.

7 UNITED STATES OF AMERICA:

May Term.

TUESDAY, *July 24th*, A. D. 1883.

Court met pursuant to adjournment.
Present: Hon. Soloman L. Withey, district judge.

THE UNITED STATES
vs.
THE MARQUETTE, HOUGHTON AND ONTONAGON RAILROAD COMPANY.

The parties to this cause being in court, by their respective attorneys, ready for trial, and the issue joined therein having been brought on for trial before the court without a jury, and the court having listened to the proofs and allegations of the parties, and the arguments of counsel, the same was taken under consideration by the court.

8 *Finding and Decision by S. L. Withey, District Judge.*

The Circuit Court of the United States for the Western District of Michigan, Northern Division.

THE UNITED STATES OF AMERICA
vs.
MARQUETTE, HOUGHTON AND ONTONAGON RAILROAD COMPANY.

Action of debt. Tried and submitted to the court July 24th, 1883, for a finding.

John W. Stone, for the United States.
W. P. Healey and J. L. Starkpole, for the defendants.

The question in this case is, whether a railroad company in 1871 was required to pay an income tax on its undivided profits used for construction. In that year the Marquette and Ontonagon Railroad Company owned and operated a road in the upper peninsula of Michigan. In 1872 the road was sold, and reorganized with another road, under the name of Marquette, Houghton and Ontonagon Railroad Company. By the State laws the new is liable for the debts of the former company.

The gross receipts of the company in 1871 were $578,565.93. It paid for operating expenses, repairs, incidental expenses, interest, and

dividends $417,121.06. The remainder, $161,444.87, which were also expended during the year, together with $231,658.54, for the following purposes:

9	For a piece of new line, shortening the old line and improving the grade	$58,706 57
	For Republic branch road	28,537 05
	" piers and water-front	128,449 46
	" miscellaneous	66,042 66
	" equipment	111,367 67
		$393,103 41

The United States claims a tax of two and one-half *of one* per cent upon the balance of the earnings before mentioned, $161,444.87, as undivided profits of the company for the year 1871. The company paid the tax on the divided earnings. The railroad company contends that the undivided profits were used during the year, they were earned for construction, were not subject to tax by the act of July 14, 1870, which controlled as to 1871 profits.

The question arises from a change made in 1870, in the language of the provision of the act of 1866, imposing an internal revenue tax on profits of railroad and some other corporations. The substance of the provision in the act of 1866, is this:

"Any railroad company * * that may have declared any dividend * * * as part of the earnings, profits, income, or gains of such company, and all profits of such company carried to the account of any fund, or used for construction, shall be subject to, and pay a duty of, five per centum on the amount of all such * * * dividend or profits." 13 Statutes at Large, page 284, section 122, bring the act of 1864, as re-enacted in 1866, in 14 Statutes at Large, page 139, section 9.

10 The act of 1870, is entitled "An act to reduce taxes, and for other purposes," wholly does away with such income tax after the year 1871, and reduces the tax for that year from five to two and one-half per cent.

The provision in question reads as follows:

"There shall be levied and collected for and during the year 1871 a tax of two and one-half per centum on the amount of * * * all dividends of earnings or gains hereafter declared by any * * * railroad company, * * * and on all undivided profits of any such corporations which have accrued and been earned and added to any surplus, contingent, or other fund."

16 Statutes at Large, page 260, section 15.

Both acts required returns to be made to the proper internal revenue officers of the amount of income, profits, and taxes aforesaid, and impose a penalty for neglect to make such returns. Without the proper return of income the officers of the Government would not know whether there were profits other than such as were divided and on which the tax was paid. And yet defendant claims that by

not demanding the tax now sought to be recovered the Government must have construed the charge in the tax provision as exempting undivided profits used for construction from the tax of two and one-half per cent. That the Internal Revenue Commissioner did not require the tax to be paid til- 1881 is urged as evidence of a change in the views of that officer as to defendant's liability.

11 But there is no evidence that it was known to the officers of the revenue that there were undivided profits in 1871, or that the fact was known to them until about the time this suit was brought in August, 1881, which is a sufficient reply to the claim that in 1871 the Government officers recognized the construction now contended for by defendant.

This view leaves section fifteen of the act of 1870 open to such construction as it ought to receive, considered in connection with the corresponding provision in the act of 1866, without it being said that any department of the Government has acquiesced for ten years in such construction of the law as contended for by the defendant. Both the provisions in 1866 and 1870 relate to and embrace profits not divided. That of 1866 is—

"All profits carried to the account of any fund or used for construction."

In 1870, as recast, it reads:

"All undivided profits added to any surplus, contingent, or other fund."

If the words or used for construction had been omitted from the clause in the act of 1866 would the scope of the provision be materially or at all different? Undivided profits are carried or added to construction fund as a matter of book-keeping, and, in fact, whenever they are used for construction.

Do not and should not railroad companies transfer net earnings used for construction to construction fund account?

12 If, as a matter of book-keeping, such is not only the proper but the usual practice, then it would not seem to affect the meaning and scope of the provision if the words "or used for construction" were omitted altogether from the act of 1866, for the Congress of the United States will be presumed to have employed the language with reference to the known usage and proper practice in such cases.

This view narrows the question to whether the undivided profits in question were "added to" any "fund." It is in proof and is conceded by defendant's counsel that these undivided profits of 1871 were carried to an account called "expended earnings," and that they were used for construction. Then it is manifest that the expended earnings' account represented construction account or construction fund, and when such undivided profits were carried to such account they were "added" to a "fund."

In book-keeping, and within the meaning of the act of 1870, net earnings or undivided profits are added to a particular fund by proper transfer entered in the books of account; but the object of

the statute is not defeated if profits used for construction are not carried into the proper account on the books, for, within the meaning of the statute and according to common understanding and experience, they must be considered as added to construction fund if they are used for construction. It is incorrect to say, in relation to this statute of 1870, that undivided profits cannot be added to a
13 fund unless there remains in the particular fund a balance to be added to, for, if undivided profits are carried, in the books of account, to surplus, contingent, or other fund account overdrawn, they are considered added to the fund which that account represents as much as though it was not overdrawn.

In short, the provision of the statute of 1870 was intended to reduce the tax on profits from five to two and one-half per cent, but was not intended to remove from such reduced tax any part of the profits.

The further contention is, that the claim of the Government is barred by time. Congress has not seen fit to enact a statute limiting the time within which the United States shall bring suit in a case like the present one, and it does not appear that the defendant has been prejudiced by such delay, as has occurred after allowing reasonable time to bring suit. In a case where commencement of suit by the United States is delayed many years, and the delay has prejudiced the defendant by the disappearance or loss of evidence essential to his defence, courts ought to apply a rule that will protect individual rights by giving repose and security to the citizen against State claims, but such is not this case.

The item of $58,706.57, expended by the railroad company for a piece of new line of road for the purpose of shortening its track and reducing grade of its road, properly belongs with expendi-
14 tures for improvements, and, having been paid from earnings, reduces the undivided profits to $102,738.30. The court finds that this last sum was subject to a tax, by the law of 1870, as undivided profits, and that defendant is indebted to the plaintiff to a tax of two and one-half per centum thereof, being a tax of $2,568.46, and also for interest from the time of the commencement of this suit, two years and one month, $374.56.

Judgment will be entered accordingly in favor of the plaintiff and against the defendant, for $2,943.02, and for costs to be taxed, with interest on the amount from this date.

Dated September 20, 1883.

S. L. WITHEY,
District Judge.

Let the judgment be entered as of the last day of the last term of court, pursuant to the State statute governing the practice in such case.

S. L. WITHEY,
Dis'ct Judge.

Filed Sept. 20, 1883.

GAD SMITH,
Dep. Clerk.

15 UNITED STATES OF AMERICA:

May Term.

TUESDAY, *July 24th*, A. D. 1883.

Court met pursuant to adjournment.
Present: Hon. Solomon L. Withey, district judge.

UNITED STATES

vs.

THE MARQUETTE, HOUGHTON AND ONTONAGON RAILROAD COMPANY.

The issue joined in this cause having been heretofore brought on for trial before the court without a jury, and by the court taken under consideration, and due deliberation thereon being had, and the said court having found that the said defendant doth owe to the said plaintiff the sum of twenty-nine hundred and forty-three dollars in manner and form as the said plaintiff hath in its declaration in this cause alleged, and having assessed the damages of the said plaintiff on occasion of the detention thereof at six cents over and above its costs and charges by it about its suit in this behalf expended, therefore it is considered that the said plaintiff does recover against the said defendant its debt aforesaid, and also its damages by the court aforesaid in form aforesaid assessed, together with its costs and charges aforesaid to be taxed, and that the said plaintiff have execution thereof.

16 In Circuit Court of the United States for the Western District of Michigan, Northern Division.

UNITED STATES OF AMERICA

vs.

MARQUETTE, HOUGHTON AND ONTONAGON RAILROAD COMPANY.

At the request of W. P. Healy, attorney for the defendant, the following supplemental findings are made to the former findings in this cause:

First. The court finds that the United States assessor of internal revenue sent to the Marquette and Ontonagon Railroad Company blanks on which to make return of the profits for 1871, and before making such returns the said railroad company exhibited to such assessor a synopsis of its accounts, after which said company made return of the profits as it — understood to be in accordance with the assessor's views or advice; but it does not appear that the assessor understood that there were any undivided profits, and it does not appear that such revenue officer advised said railroad company that undivided profits used for construction were not subject to payment of an income tax.

Second. The court finds that at the time of the purchase by the defendant of the Marquette and Ontonagon railroad and the consolidation of the two companies the defendant had no notice that there was any internal revenue tax due from said Marquette and

Ontonagon Railroad Company, or that there was any tax claimed by the Government from said company.

Dated Nov. 8, 1883. S. L. WITHEY,
Dist. Judge.

Filed November 10, 1883. GAD SMITH,
Dep. Clerk.

17 UNITED STATES OF AMERICA:

May Term.

MONDAY, *Sept.* 24, A. D. 1883.

Court met pursuant to adjournment.

UNITED STATES
vs.
MARQUETTE, HOUGHTON & ONTONAGON RAILROAD COMPANY.

On motion of W. P. Healy, defendant's attorney, ordered that time to settle bill of exception in this case be, and hereby is, extended sixty days from this date, and that in the meantime execution be stayed.

18 In the Circuit Court of the United States for the Western District of Michigan, Northern Division.

UNITED STATES OF AMERICA
vs.
MARQUETTE, HOUGHTON & ONTONAGON RAILROAD COMPANY.

The said defendant, by W. P. Healy, its attorney, comes and alleges exception to the conclusions of law reached by the court in this case, as follows:

1. To the conclusion that "there is no evidence that it was known to the officers of the revenue that there were undivided profits in 1871."

2. To the conclusion that "this view leaves section fifteen of the act of 1870 open to such construction as it ought to receive, considered in connection with the corresponding provision in the act of 1866, without it being said that any department of the Government has acquiesced for ten years in such construction of the law as contended for by the defendant."

3. To the conclusion that the "expended earnings" account represented construction account, or construction fund, and when such undivided profits were carried to such account they were "added to a fund."

4. To the conclusion that "in short, the provision of the statute of 1870 * * * * was not intended to remove from such reduced tax any part of the profits."

5. To the conclusion that, "and it does not appear that the defendant has been prejudiced by such delay as has occurred, after allowing reasonable time to bring suit."

6. To the conclusion that "that court finds that this last sum ($102,738.30) was subject to a tax by the law of 1870, as
19 undivided profits, and that defendant is indebted to the plaintiff for a tax of two and one-half per centum thereof, being a tax of $2,568.46, and also for interest from the time of the commencement of the suit, two years and one month, $374.56."

7. To the conclusion that "judgment will be entered accordingly in favor of the plaintiff, and against the defendant, for $2,943.62, and for costs of suit to be taxed, with interest on the judgment from this date."

W. P. HEALY,
Attorney for Defendant.

Filed Sept. 22, 1883.

GAD SMITH,
Dep. Clerk.

20 A meeting of the board of directors of the Marquette, Houghton & Ontonagon Railroad Company was held at the office of the company, No. 66 State street, Boston, Massachusetts, on the 24th day of October, A. D. 1883. Present: Messrs. George Higginson, William Suxes, F. W. Thomas, John P. Lyman, and J. L. Stackpole—a quorum.

Mr. Stackpole offered the following resolution:

Resolved, That a writ of error be taken to the Supreme Court of the United States in the suit brought by the United States against this company in the circuit court of the United States for the western district of Michigan, northern division, for the recovery of a United States tax, and that a bond in the sum of six thousand dollars be executed by this company, with sufficient sureties, to the United States, conditioned to prosecute said writ of error to effect, and pay the whole amount of the judgment or decree, including just damages for delay, and costs and interest on the appeal, if it shall fail to make good its plea.

The foregoing resolution was adopted unanimously.

I, John P. Lyman, secretary of the Marquette, Houghton & Ontonagon Railroad Company, do hereby certify the above and foregoing to be a true copy, compared by me, of the record of a resolution adopted by the board of directors of said company at a meeting held by said board on the 24th day of October, A. D. 1883.

21 In witness whereof, I have hereunto set my hand, and have affixed the seal of said company, this 24th day of October, A. D. 1883.

[SEAL.]

J. P. LYMAN,
Sec'y M., H. & O. R. R. Co.

22 Supreme Court of the United States.

THE UNITED STATES
v.
MARQUETTE, HOUGHTON & ONTONAGON RAILROAD COMPANY.

Know all men by these presents that we, The Marquette, Hough-

ton & Ontonagon Railroad Company, a corporation organized under the general railroad laws of the State of Michigan, as principal, and Samuel Schock and William P. Healy, of Marquette, Michigan, as sureties, are held and firmly bound unto the United States in the sum of six thousand dollars, to be paid to the said United States, its agent, or attorney; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, administrators, and successors firmly by these presents.

Sealed with our seals, dated this twenty-fourth day of October, A. D. 1883.

Whereas the above-named Marquette, Houghton & Ontonagon Railroad Company has prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the circuit court of the United States for the western district of Michigan, northern division:

Now, therefore, the condition of this obligation is such, that if the above-named Marquette, Houghton & Ontonagon Railroad
23 Company shall prosecute its said writ of error to effect, and pay the whole amount of the judgment or decree, including just damages for delay, and costs and interest on appeal, if it shall fail to make good its plea, then this obligation shall be void; otherwise, to remain in full force and virtue.

[SEAL.] THE MARQUETTE, HOUGHTON & ONTONAGON R. R. CO.,
By GEO. HIGGINSON, *Pres't.*
J. P. LYMAN, *Sec'y.*
SAMUEL SCHOCH. [SEAL.]
WILLIAM P. HEALY. [SEAL.]

Sealed & delivered in presence of—
CHAS. HALL ADAMS, to G. H. & J. P. L.
T. EDW. EATON, to J. P. L.
EDITH H. JOPLIN, to G. H.

STATE OF MASSACHUSETTS, *County of Suffolk, City of Boston,* } ss:

I, Charles Hall Adams, a notary public, duly appointed, commissioned, and sworn, in and for the county of Suffolk, and State of Massachusetts, do hereby certify that on the day of the date hereof, personally [came] George Higginson, known to me to be the president, and John P. Lyman, known to me to be the secretary, Marquette, Houghton and Ontonagon Railroad Company, and severally acknowledged that they executed the within instrument, and affixed the corporate seal of said company thereto, as and that the same was the free act and deed of said corporation, and the said George Higginson and John P. Lyman, being each by me duly sworn, did each depose and say that they are the president and secretary, respectively, of the Marquette, Houghton and Ontonagon Railroad
24 Company; that they know the corporate seal of said company; that the seal affixed to the within instrument is such

corporate seal; that it was so affixed by authorization of said company, and that they signed their names thereto by like authorization.

In witness whereof, I have hereunto set my hand and notarial seal, this twenty-fourth day of October, A. D. eighteen hundred and eight-three, at the city of Boston, in the county of Suffolk and State of Massachusetts.

[SEAL.] CHAS. HALL ADAMS,
Notary Public.

WESTERN DISTRICT OF MICHIGAN, *Northern Division*, } ss:

Samuel Schoch and William P. Healy, being duly sworn, depose and say, and each for himself saith, that he is worth the sum of six thousand dollars and upwards over and above all his just debts and liabilities.

WILLIAM P. HEALY.
SAM'L SCHOCH.

Sworn to before me, this 5th day of Nov., A. D. 1883.
GAD SMITH,
Deputy Clerk.

I approved the above bond & the sufficiency of the sureties thereto.
Dated Nov. 8th, 1883. S. L. WITHEY,
Dist. Judge.

Filed Nov. 10th, 1883. GAD SMITH,
Deputy Clerk.

25 *Assignment of Errors & Prayer for Reversal.*

In the Supreme Court of the United States.

MARQUETTE, HOUGHTON & ONTONAGON RAILROAD COMPANY,
Pl'ff in Error,

v.

UNITED STATES OF AMERICA, Def't in Error.

Now, to wit, on this 13th day of November, A. D. 1883, comes the said Marquette, Houghton & Ontonagon Railroad Company, by W. P. Healy, its attorney, and says that in the record and proceedings and in the giving of judgment aforesaid there is manifest error in this, to wit:

First. In the conclusion of law in the special finding of facts & law that no department of the Government has acquiesced for ten years in the construction of the law as contended for by the plaintiff in error.

Second. In the conclusion that the "expended earnings" account represented a construction fund, and that where undivided profits were carried to the "expended earnings" account, and all expended, they were, nevertheless, added to a fund.

Third. In the conclusion of law that the provision of the statute of 1870 was not intended to remove from the reduced tax any part of the profits.

Fourth. In the conclusion that it does not appear that the plaintiff in error has been prejudiced by such delay as has occur-ed—ten (10) years—in bringing suit.

Fifth. In the conclusion that "the court finds that this last
26 sum ($102,738.30) was subject to a tax by the law of 1870 as undivided profits, & that plaintiff in error is indebted to defendant in error for a tax of two & one-half per centum thereof, being a tax of $2,568.46, and also for interest from the time of the commencement of the suit, two years & one month, $374.56.

Sixth. In the conclusion that "judgment will be entered accordingly in favor of the plaintiff (defendant in error) and against the defendant (plaintiff in error) for $2,943.62, and for costs of suit to be taxed, with interest on the judgment from this date.

And the said Marquette, Houghton & Ontonagon Railroad Company prays that the judgment aforesaid for the errors aforesaid and other errors in the record and proceedings may be reversed, annulled, and altogether held for nothing, and that it may be restored to all things which it has lost by occasion of the said judgment, &c.

W. P. HEALY,
Attorney for Plaintiff in Error.

Filed Nov. 15th, 1883.

GAD SMITH,
Deputy Clerk.

27 UNITED STATES OF AMERICA, *ss:*

To the United States, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the sixth circuit and western district of Michigan, northern division, wherein the Marquette, Houghton & Ontonagon Railroad Company, a corporation organized under the laws of the State of Michigan, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable S. L. Withey, district judge, sitting in circuit court for the western district of Michigan, northern division, this eighth day of November, in the year of our Lord one thousand eight hundred and eighty-three.

S. L. WITHEY,
Dist. Judge.

28 [Endorsed:] 52. In the Supreme Court of the United States. Marquette, Houghton & Ontonagon Railroad Company. pl'ff in error, *v.* The United States, def'ts in error. Citation. Filed Nov. 10, '83. Gad Smith, dep. clerk. W. P. Healy, att'y for pl'ff in error.

29 In the Circuit Court of the United States for the Western District of Michigan, Northern Division.

UNITED STATES OF AMERICA

v.

MARQUETTE, HOUGHTON & ONTONAGON RAILROAD COMPANY.

At a session of said court held at the court-house in the city of Marquette, in said western district of Michigan, northern division, on the 23d day of July, A. D. 1883, before Hon. Solomon L. Withey, district judge, sitting as circuit judge of the said circuit court, the issue joined between the parties in this cause came on to be tried before the court without a jury, (a jury having been duly waived in writing by both parties,) at which day came there as well the plaintiff as the defendant by their respective attorneys.

The plaintiff, to maintain the issue on their part, introduced in evidence the deposition of Joseph F. Grenough, which deposition tended to show that he was treasurer of the Marquette & Ontonagon Railroad Company from 1863 to August, 1872; that said company was consolidated with the Houghton & Ontonagon Railroad Company in 1872 under the name of The Marquette, Houghton & Ontonagon Railroad Company, the consolidated company having about 90 miles of railroad, & the Houghton & Ontonagon Railroad Company, its officers, directors, and stockholders, were entirely distinct from the Marquette & Ontonagon and were before the consolidation; that the Houghton & Ontonagon bought out the Marquette & Ontonagon and then consolidated; that prior to the tax of 1871 the Marquette & Ontonagon had paid the United States taxes regularly; that the assessors sent the Marquette & Ontonagon Railroad Company
30 blanks which witness always filled up and paid the taxes as they laid them; that said witness took a synopsis of his accounts to the assessors and made up his statements in accordance with their advice; that witness paid the tax for 1871 on the dividend. In that year the Marquette & Ontonagon paid a dividend to the stockholders of five per cent. September 11th, the only dividend paid that year, the amount of which dividend was $78,875; the tax paid to the U. S. Government was $2,022.43. Said witness testified that there was also a coupon tax paid on the bond. No other United States assessment was made in that year to the knowledge of witness on the Marquette & Ontonagon Railroad Company. No blanks were sent to witness to fill up for any other assessment, no demand was made upon him for any other tax by the assessors. Witness first heard that there was a claim for another tax in 1881. The net earnings of the Marquette & Ontonagon for the year 1871 were $266,237.96. Gross receipts from all sources $578,575.93, which does not include land sales. The amount of receipts for lands sold was $36,442.80. The operating repairs and incidental expenses were $312,327.97. The return made to the State of Michigan did not include incidental expenses. The amount of their incidental expenses was $35,340.90, which was carried to the debit of the earnings account and should have been divided between the operating

expenses and repairs. There were also expenses for interest and discount, $23,895.66. The net earnings for the year 1871, after deducting interest, discount, & dividend, including the United States tax, was $161,444.87. That balance was all expended on necessary work, on work necessary for the protection of the business
31 of the road, which included the lowering of the grade where it was too high for safety. The grade about eight miles west of Marquette was too steep, a very heavy up grade, which for several years the company had intended to change. The company built a new piece of line, shortening the line and getting a better grade. This cost $58,706.57 in 1871. The company gave up the old piece of line as soon as this was completed. The new piece was a loop. When the first surveys were made the county was very thickly covered with underbrush, and after the country was more cleared up they found a better line. The track was taken up from the old piece of line. The company also expended in 1871 on the Republic branch $28,537.05, and upon piers & water front in 1871 $128,449.46. That was for extending the piers to meet the demand for business in that year. For miscellaneous construction during the year, for double tracks where needed, & purchases of land for the uses of the road the company expended in 1871 $66,042.76. This construction was going on all through the year. The company borrowed $60,763.74 in 1871, over and above what was repaid. The actual amount borrowed in 1871 was $153,293.13. There was expended for equipment in 1871 $72,191.82, engines & cars purchased. There was also expended for stock on hand used in construction of cars at Marquette, being the amount of increase of stock in the hands of the superintendent over that of the previous year, $39,175.85, making a total for equipment of $111,367.67. The company did not add any undivided profits to any surplus, contingent, or other
32 fund, nor were they added at Marquette. The company needed the money & expended it up there.

There was an account in the ledger called "expended earnings" account, which represented money earned & expended on the road. It did not represent any cash surplus, for it was all expended on the road. The principal office of the company was kept in Boston where the treasurer resided and attended to the finances of the company. It was admitted that this suit was authorized to be brought by the proper authority, the Commissioner of Internal Revenue. It is conceded that the Marquette & Ontonagon Railroad Company was doing business as a railroad company in 1871, and was operating its railroad in Michigan during the time alleged in plaintiff's declaration. Also admitted that the defendant is formed by the consolidation of the said Marquette & Ontonagon Railroad Company with another railroad company called the Houghton & Ontonagon Railroad Company (also a corporation of the State of Michigan), and that such consolidation was made under & by virtue of the general railroad laws of Michigan.

The plaintiff then rested.

The defendant, to maintain the issue on its part, called C. H. V.

Cavis, who, being duly sworn, testified that he has been chief engineer of the defendant & its predecessor since 1864, up to the present time; that in 1871 the line of the road of the Marquette & Ontonagon Railroad Company was shortened one mile and
33 fifty-six hundreths and lowered the grade.

BENJAMIN W. WRIGHT, a witness called by defendant, being duly sworn, testified as follows:

I have been an accountant & book-keeper for the past twenty-five years, and I am now county treasurer of Marquette county.

(The journal & ledger of the Marquette & Ontonagon Railroad Company for 1871 & other years are here shown to the witness.)

I have examined these books of the railroad company, and can state that the "expended earnings" account on the ledger for the year 1871 do not represent any surplus or cash on hand. I find Mr. Grennough's deposition to be correct, and find no surplus cash on hand at the end of 1871 after deducting construction, ordinary repairs, and operating expenses, from the gross earnings. This expended earnings account was merely a matter of form for their book-keeping—a matter of convenience. The construction was not charged in that account in 1871. Expended earnings account was finally closed into construction account. It was conceded that all the earnings of 1871 were expended in operating expenses and in repairs and construction and incidental expenses.

The defendant then rested, and the foregoing is a substantial statement of all the evidence in the case considered material to raise the questions involved.

The case being then argued was submitted and taken under advisement by the court.

The deposition of Joseph F. Grenough, introduced by the plaintiff, was originally taken on behalf of defendant at Boston, Mass., June 12, 1882.

34 The defendant requested a written finding of facts and law; and the said judge afterwards, on the 24th day of September, 1883, gave judgment in favor of the plaintiff and against the defendant, & filed his written finding of facts and law therein, and under the statute of the State of Michigan, adopted as a rule of said court, ordered said judgment to be entered as of the last day of the preceding term of said court, July 26th, 1883. And on the giving of said judgment the said defendant, by its counsel, alleged exceptions in writing to the conclusions of law in said written finding of facts and law, which exceptions are as follows:

1. The defendants excepts to the conclusions that "there is no evidence that it was known to the officers of the revenue that there were undivided profits in 1871."

2. To the conclusion that "this view leaves section fifteen of the act of 1870 open to such construction as it ought to receive, considered in connection with the corresponding provision in the act of

1866, without it being said that any department of the Government has acquiesced for ten years in such construction of the law as contended for by the defendant."

3. To the conclusion that the "'expended earnings' account represented construction account or construction fund, and when such undivided profits were carried to such account they were added to a fund."

4. To the conclusion that "in short, the provision of the statute of 1870 * * * was not intended to remove from such reduced tax any part of the profits."

35 5. To the conclusion that, "and it does not appear that the defendant has been prejudiced by such delay as has occurred after allowing reasonable time to bring suit."

6. To the conclusion that "the court finds that this last sum ($102,738.30) was subject to a tax, by the law of 1870, as undivided profits, & that defendant is indebted to the plaintiff for a tax of two and one-half per centum thereof, being a tax of $2,568.46, and also for interest from the time of the commencement of the suit, two years and one month, $374.56."

7. To the conclusion that "judgment will be entered accordingly in favor of the plaintiff and against the defendant for $2,943.02 and for costs of suit to be taxed, with interest on the judgment from this date."

And because none of the said several matters appear on the record of said trial, on the request of the counsel for the defendant this bill of exceptions has been settled and signed this 8th day of November, A. D. 1883.

S. L. WITHEY,
Dist. Judge.

36 [Endorsed:] 52. In the circuit court of the United States for the western district of Michigan, northern division. United States *v.* Marquette, Houghton & Ontonagon Railroad Company. Bill of exceptions. Filed November 10, '83. Gad Smith, dep. clerk.

37 UNITED STATES OF AMERICA,
Western District of Michigan, Northern Division, } ss:

To the Honorable Justices of the Supreme Court of the United States:

And now comes the Marquette, Houghton & Ontonagon Railroad Company, by W. P. Healy, its attorney, and complains that in the records & proceedings, and also in the rendition of judgment in a suit between the United States of America, plaintiff, and said Marquette, Houghton & Ontonagon Railroad Company, defendant, tried in the circuit court of the United States for said western district of Michigan, northern division, at May term thereof, A. D. eighteen hundred and eighty-three, and in which judgment was rendered against said Marquette, Houghton & Ontonagon Railroad Company on the 24th day of September, A. D. eighteen hundred and eighty-three, manifest error has intervened to the great damage of the said Marquette, Houghton & Ontonagon Railroad Company.

Wherefore said Marquette, Houghton & Ontonagon Railroad Company prays for the allowance of a writ of error, and such other process, as may cause the same to be corrected by the Supreme Court aforesaid.

W. P. HEALY,
Defendant's Attorney.

Allowed.
S. L. WITHEY,
Dis't Judge.

38 [Endorsed:] In the Supreme Court of the United States. Marquette, Houghton & Ontonagon Railroad Company, pl'ff in error, *v.* The United States, def't in error. Petition for writ of error. W. P. Healy, att'y for pl'ff in error.

39 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the western district of Michigan, northern division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, between The United States as plaintiff and The Marquette, Houghton & Ontonagon Railroad Company, a corporation organized under the laws of the State of Michigan, as defendant, the said Marquette, Houghton & Ontonagon Railroad Company being now plaintiff in error and the United States being defendants in error, a manifest error hath happened. to the great damage of the said Marquette, Houghton & Ontonagon Railroad Company, plaintiff in error, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the third day of November, in the year of our Lord one thousand eight hundred and eighty-three.

[SEAL.] HENRY M. HINSDILL,
Clerk of the Circuit Court of the United States for the Western District of Michigan, Northern Division.
By GAD SMITH, *Deputy Clerk.*

Allowed.
S. L. WITHEY,
U. S. Dist. Judge.

40 [Endorsed:] 52. In the Supreme Court of the United

States. Marquette, Houghton & Ontonagon Railroad Comp'y, pl'ff in error, *v.* United States, def'ts in error. Writ of error to circuit court of United States, western district of Michigan, northern division. Filed November 3, '83. Gad Smith, deputy clerk. W. P. Healy, att'y for pl'ff in error, Marquette, Michigan.

41 WESTERN DISTRICT OF MICHIGAN, } ss:
Northern Division, }

I, Gad Smith, deputy clerk of the United States in and for said district, do hereby certify that the within and foregoing is a true [copy] of the original files and records of the cause therein entitled; that I have carefully compared the same with the originals thereof now remaining on file and of record in my office, and that they are a true transcript therefrom and of the whole of such originals.

In witness whereof, I have hereunto set my hand and the seal of said court, at Marquette, this seventh day of April, A. D. one thousand eight hundred and eighty-four.

[SEAL.] GAD SMITH,
Dep. Clerk.

Endorsed on cover: W. Michigan C. C. U. S. No. 1072. The Marquette, Houghton & Ontonagon Railroad Company, plaintiff in error, *vs.* The United States. Filed 13th October, 1884.

123-722

123-722

FILED.
OCT 3 1887
JAMES H. MCKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1887.

No. 99

MARQUETTE, HOUGHTON & ONTONAGON RAILROAD COMPANY,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

Error to Circuit Court of the United States for Western District of Michigan—Northern Division.

BRIEF OF W. P. HEALY,

Counsel for Plaintiff in Error.

MINING JOURNAL PRINT, MARQUETTE, MICHIGAN.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM 1887.

No. .....

MARQUETTE, HOUGHTON & ONTONAGON RAILROAD COMPANY,
Plaintiff in Error.
v.
UNITED STATES OF AMERICA,
Defendant in error.

Error to Circuit Court of United States for Western District of Michigan —Northern Division.

BRIEF OF W. P. HEALY, *Counsel for Plaintiff in Error.*

STATEMENT OF THE CASE.

In 1871 the Marquette & Ontonagon Railroad Company was operating a line of road in Marquette county, Michigan In 1872 the Houghton & Ontonagon Railroad Company purchased the Marquette & Ontonagon, and both roads were then consolidated under the name of the Marquette,

Houghton & Ontonagon Railroad Company. (*Record p. 13.*)

In 1881, ten years after the sale of the Marquette & Ontonagon, this action was commenced by the United States against plaintiff in error, to recover an income tax alleged to be due to the government for the year 1871, on the undivided profits of the Marquette & Ontonagon Railroad Company for that year.

The declaration avers that the income of the Marquette & Ontonagon Railroad Co. for 1871 amounted to $615,008.73, and that after deducting operating expenses, ordinary repairs and dividend to stockholders declared during said year, the said company had on hand at the close of the year 1871, $249,146.66, which constituted the undivided profits of said corporation which had accrued and been earned and added to the surplus funds of said corporation during said year 1871. (*Record p. 1.*)

That thereupon said company became liable to pay a tax of two per cent. of the net earnings aforesaid which it has neglected and refused to pay, etc. (*Record p. 1.*)

The case was tried before the court without a jury by stipulation of the parties and a finding of facts was made by the district judge to which finding he afterwards added a supplemental finding. (*See record pp. 3-7, pp. 7-8.*)

A bill of exceptions embodying all the evidence in the case was allowed by the district judge. (*Record pp. 13-16.*)

The district judge found the following facts:

The gross receipts for 1871 were.....	$578,565.93
Expended for operating expenses, repairs, incidental expenses, interest and dividends	417,121.06
Leaving a balance of.....	$161,444.87

All this balance of $161,444.87, and $231,658.54 in addition thereto, were expended in 1871 for the following purposes:

For a piece of new line, shortening the old line and improving the grade	$58,706.57
For Republic Branch road..	28,537.05
For piers and water front	128,449.46
For miscellaneous	66,042.69
For equipment	111,367.67
Total.....	393,103.41

The company paid the tax on the divided earnings. (*Record p. 4.*)

The district judge in his supplemental finding of facts (*Record pp. 7-8*), finds that the Marquette & Ontonagon Railroad Company exhibited a synopsis of its accounts to the assessor of internal revenue in 1871, and made returns to the government under the advice of the assessor and paid taxes on such returns.

The written finding of facts were duly filed and exceptions in writing were taken thereto, specifying the particular objections to the conclusions of law arrived at by the district judge. (*Record p. 8.*)

The circuit court then allowed 60 days for making and settling a bill of exceptions, which was duly made, containing all the material evidence and was signed by the district judge and filed in the case.

After the bill of exceptions was filed a writ of error and citation were allowed and issued, and assignment of errors made and filed.

II.

Assignment of errors upon which a reversal is asked. (*Record pp. 11–12.*)

1. In the conclusion of law in the special finding of facts and law, that no department of the government has acquiesced for ten years in the construction of the law as contended for by the plaintiff in error.

2. In the conclusion that the "expended earnings" account represented a construction fund,

and that where undivided profits were carried to the "expended earnings" account and all expended they were nevertheless added to a fund.

3. In the conclusion of law that the provision of the statute of 1870 was not intended to remove from the reduced tax any part of the profits.

4. In the conclusion that it does not appear that the plaintiff in error has been prejudiced by such delay as has occurred—ten years—in bringing suit.

5. In the conclusion that "the court finds that this last sum (of $102,738.30) was subject to a tax by the law of 1870 as undivided profits, and that plaintiff in error is indebted to defendant in error for a tax of two and one-half per cent. thereof, being a tax of $2568.46, and also for interest from the time of the commencement of the suit, two years and one month, $374.56.

6. In the conclusion that "judgment will be entered accordingly in favor of the plaintiff [defendant in error] and against the defendant [plaintiff in error] for $2943.62 and "costs of suit to be "taxed, with interest on the judgment from this date."

III.

Argument.

1. The first assignment of error that no department of the government acquiesced for ten years in the construction of the law as claimed by plaintiff in error, and the fourth assignment of error that the delay of 10 years in bringing suit has not prejudiced the defendant, may be discussed together.

The supplemental finding of facts show that the Marquette & Ontonagon Company submitted a synopsis of its accounts to the assessor of internal revenue and made out its returns under his advice. (*Record p.* 7.)

The company thus paid its taxes as assessed by the assessor. There is nothing in the record to impugn the good faith of the parties, and no question was raised until ten years afterwards when the United States commenced the present suit.

To this finding the judge added that it does not appear that the assessor understood that there were any undivided profits, or that he advised the company that undivided profits used for construction were not subject to payment of an income tax. It is true that the specific advice given by the assessor does not appear, but it does appear that he had

access to the accounts of the company, that his advice was asked as to what should be returned as taxable, that his advice was followed and taxes paid according to such advice.

In the meantime the road was sold to another company, the present defendant.

If the new company, defendant in this suit, simply bought the old road without consolidation, it would not be liable, but having consolidated under the laws of Michigan, the new company is liable for the debts of the old one.

This is proper enough in the case of just debts, and I will concede that in ordinary cases, the statute of limitations ought not apply against the government.

But where the government gives a receipt in full for all taxes claimed to be due it and stands by while property is being sold to an innocent party, and waits ten years during which time the stock of the company is presumably changing hands, and then tries to collect this claim from a person who never incurred the liability except technically, and who had no means of indemnifying itself owing to the negligence of the government, it seems to me, that the line ought to be drawn there.

The district judge who tried the case must have regarded it as a rather stale and unjust claim, be-

cause he refused to allow interest during the 10 years. He allowed interest only from the time of the commencement of the suit (*Record p. 6*). Yet if the government was entitled to the principal sum it was also entitled to legal interest, for the whole 10 years.

It is true that defendant cannot complain of an error in its favor, if it is such, and does not complain of it, but we call attention to it in order to show that the district judge instinctively felt that defendant was prejudiced, although in his conclusion of law, the judge says that defendant was not prejudiced.

It is not a question of statute of limitations at all, but the question is, shall an innocent third party suffer by the negligent action of the government in its dealings with its debtors?

In ordinary cases between private individuals, the case could be disposed of without reference to the statute of limitations. There had been a full settlement between the Marquette and Ontonagon Railroad Company and the government. The company had its receipt in full for all taxes claimed by the government.

Hence the defendant, in buying out the railroad of the Marquette & Ontonagon, could not protect itself from this very stale claim, and the failure of the government to make any attempt to enforce its alleged claim for 10 years has put it beyond the power of defendant to be indemnified by the former owners of the Marquette & Ontonagon.

IV.

The second, third and fifth assignments of error (*Record pp. 11-12*), [redacted] the question, whether net earnings expended in construction were liable to the tax of two and one half per cent under *Sec.* 15 *ch.* 255, 15 *U. S. Stats. at Large* 260.

The district judge held that the "expended earnings account" represented a construction fund, and that where undivided profits were carried to the "expended earnings" account *and all expended*, they were, nevertheless, added to a fund; that they must still be considered "undivided," although none whatever were left in the treasury of the company, having been all expended. (*Record p. 5.*)

The district judge found as facts that all the undivided profits were expended in 1871. (*Record p. 4.*)

There was a dividend paid to the stockholders in 1871 and the income tax on that dividend was paid. (*Record p.* 4.)

The entire net earnings (less dividend and interest) and $231,658.54 besides, were expended during the year in construction and equipment, hence there were no undivided profits left in the treasury. They were all expended during the year.

The question then arises, if a railroad company expended upon its road for construction in 1871, the whole of its earnings except what was paid in inter-

est and dividends, can those earnings thus expended for construction be taxed as "undivided" profits under the income tax law of 1870.
16 U. S. Stats. at Large 260 §15.

It is most material to consider the laws of 1864, 1866 and 1870 in *pari materia*, which have received a construction in this court.

These are as follows:

1864. *38th Congress. session 1, ch. 173, Sec. 122, 13 U. S. Stats. at Large 284.*

"And all profits of such company carried to the "account of any fund, *or used for construction*, shall "be subject to and pay a tax of five *per centum*.".

1866. *39th Congress. session 1, ch. 184, Sec 9, 14 U. S. Stats. at Large 139.*

"And all profits of such company carried to the "account of any fund, *or used for construction*, shall "be subject to, and pay a tax of five *per centum*."

1870. *41st Congress. session 2, ch. 255, sec 15, 16 U. S. Stats. at Large 260.*

"On all *undivided* profits of any such corporation "which have accrued, and been earned and added to "any surplus, contingent or other fund."

In the case of *Railroad Co.* v. *Collector 100 U. S. 595*, this court in construing the statute of 1866, above cited, held the term "any fund" to mean "a reserve or other fund remaining in its hands," (*p. 598*) which is identical in meaning with the language of the law of 1870 of "surplus, contingent or other fund."

A simple reading of the statute ought to be convincing that a railroad company that not only expended all its earnings, but actually borrowed money and ran in debt in carrying on the work of improving its road, did not have any *undivided* profits that year, because they were all expended.

The district judge in his finding of facts admitted that all the earnings and $231,658.54 besides were expended for repairs and construction, but in his conclusions of law he calls a portion of what was so expended "undivided profits," and in so doing we claim that he erred.

But in construing the three statutes of 1864, 1866 and 1870, it will appear very plainly that congress had no intention to continue the policy of taxing money actually sunk and invested in permanent construction.

The omission of the words "*used for construction*," occurring in both the law of 1864 and the law of 1866, is most marked. It cannot for a moment be suggested in a court of law that the omission by the supreme legislative body of the United States was accidental or from carelessness. It had a meaning and intent. What was it?

To take it on general principles. If under previous legislation there exists a specification of a tax upon a certain article, or an income tax on a certain class of income, and in subsequent legislation upon the same subject this article or class of income is omitted from the numeration of the tax-

es, it is plainly the legislative intention to omit it from the subjects of taxation. Add to this, if the purport of the Act is to reduce taxation, to omit many articles, to modify any others, if the very title of the Act is "*an Act to reduce internal taxation*," the conclusion becomes irresistible.

This is clearly stated by the Supreme Court of the United States, in criticising this very Act of 1870:—

"It is entitled an Act to reduce internal taxes and for other purposes. It repealed several sections of the internal revenue law absolutely. It fixed a period in the future for the cessation of others, and it reduced the income tax in a certain class of cases from five to two and one-half per cent., and provided for its continuance through the years 1870 and 1871; at the end of which all income tax was to cease. . . . A critical view of the whole of the statute of 1870 shows that it was designed to *recast the internal revenue laws*, to repeal some taxes, *modify others*, and declare the reenactment or continuance of others for a limited time. And this was especially true of the class of taxes embraced under the general head of *income* taxes of all kinds."

Miller J., Stockdale v. *Atlantic Ins. Co.*, 20 Wallace, 323, 330, 332.

Such being the general intent of the Act, the modifications fall under the familiar rules governing the construction of legislative intent. The

doctrine contended for is clearly stated by Bell, C. J., in

State v. *Wilson*, 43 New Hampshire 419.

"If a revising statute embraces all the provisions of antecedent laws on the subject, and reduces them to one system, such statute virtually repeals the statutes revised without any expression to that effect, and though there is no repugnancy between them—cites:—

Bartlett v. *King*, 12 Mass. 545.

Illinois Central v. *Chicago*, 14 Illinois, 334.

"*And where some parts of a revised statute are omitted in the revision they are not to be revived by construction, but are to be considered as annulled.*

Ellis v. *Paige*, 1 Pick. 43.

Rutland v. *Mendon*, 1 Pick. 154.

Blackburne v. *Walpole*, 9 Pick. 97.

Towle v. *Marrett*, 3 Greenl. 22."

So, too, in

Woods v. *Jackson Mfg. Co.*, 1 Holmes, first circuit, 385.

By Shepley, J. If the new law is intended to prescribe the only rules, the particulars of old law in which they differ are repealed by implication.

Road v. *Allen*, 16 Barb. 18.

U. S. v. *Tynen*, 11 Wall. 92.

New London R. R. v. *B. & A.*, 102 Mass. 389.

The whole is most tersely expressed by the Supreme Court of Massachusetts.

Wilde J., gives the opinion in *Ellis* v. *Page*, 1 Pickering 45:—

"It is a well-settled rule that when any statute is revised, or an Act framed from another, some parts being omitted, the parts omitted are not to be revived by construction, but are to be considered as annulled. To hold otherwise would be to impute to the Legislature gross carelessness or ignorance, which is altogether inadmissible."

Add to this the general principle that statutes which impose restrictions upon trade or common occupation, or which levy a tax or excise upon them, must be construed strictly.

Sewall v. *Jones*, 9 Pickering 414, Parker, C. J.

Green v. *Holway*, 101 Mass. 243, 248, Gray, J.

U. S. v. *Wigglesworth*, 2 Story 369.

Adams v. *Bancroft*, 3 Sumner 384.

Wroughton v. *Tuttle*, 11 Meeson & Welsby, 567.

V.

Bearing these principles in mind, we turn to the judicial interpretation of what was intended by the law of 1866, by the Supreme Court of the United States. This law is declared to be an excise tax im-

posed in a certain way upon the profits of railroad corporations, and the disposition of profits declared to be divided into four classes.

1. Dividends.
2. Interest on funded debt.
3. Construction.
4. Reserve fund.

Miller, J., says:—

"In every well-conducted corporation of this character, these profits were disposed of in one of four methods, namely, distributed to the stockholders as dividends, used in construction of its roads or canals, paid out for interest on its funded debts, or carried to a reserve or other fund remaining in its hand."

Railroad Co. v. *The Collector*, 100 U. S. 595.

Note this classification, and the distinctness of the divison line between the classes, there being as much difference in the classification Class 3, between "construction," and Class 4, "the reserve fund," as between any other two classes.

"It would," remarks Miller, J., "be competent for Congress to tax only earnings after *deducting* interest paid on bondeddebt."

Can it be doubted that it is equally competent for Congress to tax earnings after deducting sums "used for construction." And when in an Act entitled one "to reduce taxation," and so declared, Congress deliberately omits one of these four

classes, inserted in two previous Acts, can it be doubted that it intended to lighten the tax on railreads by omiting the tax upon this class?

VI.

The claim of the revenue department that these profits are added to a "construction fund," and, therefore, taxable, is entirely unsound.

Because,

1. Congress having already made a separate class for "construction," it is plain it did not also intend to make construction a part of another class.

2. "Surplus, contingent or other fund" refers to a sum of money laid up for the future wants, not to money expended. A fund signifies money to be drawn on. The word "other" on familiar principles must be construed "*in pari materia*" with "surplus or contingent," and plainly means a similar fund, showing a surplus which is laid away by the railroad company for the needs of the future day.

This was plainly the intent of Congress, and it is wholly probable that Congress, desiring to reduce the burdens of railroads, knowing that there were many like this, unfinished and in process of construction, many of them poor and struggling, who

would spend every cent of sums not needed for interest and dividends on the permanent improvement of their road, which permanent improvement, it was the interest of the entire community to foster, took this means of relieving this class of expenditures from taxation. It was really the class of all others which the public or common interest should encourage. Interest and dividends go into private purses; surplus funds are for private profit and find their way into the same receptacles sooner or later. But permanent improvements,—branches, reduction of grades, new lines,—these benefit the neighborhood, open new outlets to trade, and are for the good of the whole community. Congress could make no wiser reduction of taxation of railroads.

VII

The district judge found as facts that there remained $161,444,87, balance of the gross earnings for 1871 after deducting operating expenses, repairs, incidental expenses, interest and dividends. (*Record pp. 3-4*).

He also found as facts that this $161,444.87 was expended during the year and $230,658.54 besides. (*Record p. 4*).

Two of the purposes for which this amount was expended were:

For shortening the road and improving grade	$ 58,706.57
For piers and water front	128,449.46
Total	$187,156.03

The district judge allowed the item for shortening road and improving grade, $58,706.57, but disallowed the item of $128,449.56 for piers and water front.

If this item was allowed judgment would have gone for defendant, as both items exceed the $161,444.87.

Both items were charged up to "expended earnings" account by the company. (*Record p. 5*).

In the case of *Union Pacific R. R. Co.* v. *United States*, *99 U. S. 422*, this court held that "the 27th item of expenditures for station "buildings, shops, &c.," is a charge that may "properly be made against earnings since as "the fact is, such expenditures were actually "paid therefrom and were not carried to capital "account."

This court also held in the above case that the better and more conservative method, is to charge to ordinary expense account, and against earnings, whatever is taken for improving the road or any of its appurtenances or equipments, (p. 421).

I therefore insist that the Marquette & Ontonagon Railroad Company, in expending its net earnings in improving its road, piers and water front, had no undivided profits left, and that judgment ought to be given for defendant.

VIII.

Judgment in this case ought to be reversed because.

1. The claim is stale even against the Marquette & Ontonagon, with whom the government settled in full.

2. The present defendant ought not to be liable, owing to the action of the government in giving a receipt in full for taxes to the Marquette & Ontonagon.

3. A fair construction of the act of 1870 compared with the prior acts of 1864-6 shows that the words "or used for construction," found in the earlier acts, were purposely ommitted, because congress adopted the policy of not taxing earnings actually used in construction.

4. Under the decision in *U. P. R. R. v. U. S.*, *99 U. S.* 421-2, the Marquette & Ontonagon having actually expended the $102,738.30 net earnings

now in dispute, in improving and purchasing pier and water front, it was a proper item to deduct from net earnings, and if so, no net earnings were left, but on the contrary, a large amount of borrowed money was also expended in improvements. I submit therefore that judgment ought to be for defendant below.

W. P. HEALY,
Counsel for Plaintiff in Error.

123-122

DEC 6 1887

In the Supreme Court of the United States.

OCTOBER TERM, 1887.

THE MARQUETTE, HOUGHTON AND ONTONAGON Railroad Company, plaintiff in error,
vs.
THE UNITED STATES.
No. 99.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN.

In the Supreme Court of the United States.

OCTOBER TERM, 1887.

THE MARQUETTE, HOUGHTON AND ONTONAGON Railroad Company, plaintiff in error,
vs.
THE UNITED STATES.
} No. 99.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN.

BRIEF FOR DEFENDANT IN ERROR.

I.

This suit was brought on the 22d day of August, 1881. In the year 1871 the Marquette and Ontonagon Railroad Company owned and operated a railroad in Michigan. The gross receipts of the road, exclusive of land sales, for the year 1871 were $578,565.93. It paid for operating expenses, repairs, incidental expenses, interest, dividends, and taxes $417,121.06. Of the remaining $161,444.87, $58,706.57 was expended for a piece of new line, shortening the old line, and improving the grade. The remaining $102,738.30 was used, with other funds, for construction,

new equipment, and for a branch road known as the Republic Branch. (Rec., p. 4.)

The railroad company made a return of the profits of 1871 to the assessor, but did not in that return include the $102,738.30 which was expended on the construction of the branch road, other new constructions, and new equipments, nor did it appear the assessor knew or understood there were any undivided profits. (Rec., p. 7.)

In 1872 the Marquette and Ontonagon Railroad was sold, and reorganized by a consolidation with another road under the name of The Marquette, Houghton and Ontonagon Railroad Company. By the laws of Michigan, the new organization is liable for the debts of the original company. (Rec., p. 3.) Trial by jury having been waived, under the facts of the case the court entered judgment in favor of the United States for the tax on $102,738.30.

II

If the Marquette and Ontonagon Railroad was liable for the tax, it was a debt against it before the consolidation; for, as it was ruled in the case of the *The Savings Bank* vs. *The United States* (19 Wall., 227–240) "that no other assessment other than that made by the statute is necessary to determine the extent of the liability under the act," it became and was a fixed indebtedness owing by the railroad company to the Government as soon as the undivided profits accrued.

That the railroad company made a return in 1871 which did not include the undivided profits is no answer to the plaintiffs' action, for it is well settled that the assessment of the tax is not conclusive on the United States, on cit-

izens, or corporations. (*United States* vs. *Tilden* 9 Benedict, 368–394.)

The statute of limitations is not a bar, for such statutes do not apply against the Government. Laches as a defense do not apply to an action brought by the Government, for, in the multiplicity and variety of duties imposed upon the officers charged with any interest of the Government, such a defense would unduly jeopardize the public good, in which all are equally concerned. (*United States* vs. *Kirkpatrick*, 9 Wheaton, 735; Gaussen *vs.* The United States, 97 U. S., 590.) Besides, the facts on which the indebtedness in this case is founded was, in the first instance, only known to the railroad company, and there is no evidence that the United States, or any of its agents, knew of the undivided profits of the road until the bringing of this suit.

III.

The remaining question in the case, then, is whether a fund which is the result of the net earnings applied to or used for new purchases, or new construction, during the year 1871, is subject to the internal-revenue tax of 2½ per cent., under section 15 of the act of the 14th of July, 1870 (16 U. S. Stats., 260). The facts, as shown by the evidence, on which this question is raised are that for the year 1871 the Marquette and Ontonagon Railroad had a net balance of profits of $161,444.87 (Rec., pp. 13 and 14); that before this net balance was struck, the operating expenses, repairs, incidental expenses, interest, discount, dividends, and taxes had all been deducted from the gross

receipts. This appears from the testimony of Joseph F. Greenough, who was treasurer of the company. (Rec., pp. 13 and 14.)

The company built a new piece of line to shorten and better the grade of the road, which cost $58,706.57. The court, in order to reach the taxable balance, subtracted this, in addition to all else that had been claimed by the company. Doubtless this was regarded by the court as a renewal of the old line, and therefore substantially a repair. The $102,738.30, then, with $153,293.13 which was borrowed by the road, together with certain proceeds of land sales, constituted an aggregate fund, which during the course of the year was expended as follows: For the Republic Branch, $28,537.05; for miscellaneous construction, consisting of double tracks where needed, and purchases of land for the use of the road, $66,042.76; for purchase of water front and erection of piers, $128,449.46; for new equipments, $111,367.67. (Rec., p. 14.) The provision of the act of 1870 under which this tax is claimed is:

> There shall be levied and collected for and during the year 1871 a tax of 2½ per centum on the amount of * * * all dividends of earnings or gains heretofore declared by any * * * railroad company * * * and on all undivided profits of any such corporations which have accrued and been earned and added to any surplus, contingent, or other fund. (16 Stat. L., p. 260, § 15.)

The taxable property is to be undivided profits. The facts stated show that the money that the court below adjudged as subject to the tax was profits. All possible ex-

penses and charges to do the work and maintain the plant in good condition, as it was at the beginning of the year, had been paid before this balance was reached. The word "undivided" is used to distinguish the profits here referred to from those which in a former part of the clause quoted are called "dividends," which are divided profits. The clause "undivided profits" is sufficiently comprehensive to include all profits not applied to dividends.

The next qualification of the taxable profits is that they shall "be earned." This qualification is fully met by the evidence.

The next qualification is they are to be profits which are "added to any surplus, contingent, or other fund." The funds described as "surplus," and "contingent" in this sentence are disjunctively connected with "or other fund," so that, to render the profits taxable, it is not necessary the railroad company should have kept any surplus or contingent fund to which to add the net profits. Any "other fund" meets all the requirements of the law.

A construction fund is well known in railroad bookkeeping. To this fund, which was made up in part of money borrowed and in part of the proceeds of land sales, this profit was added. This aggregate fund, of which the profits on which taxation is claimed constituted a part, made up a construction fund. Every requirement in the statute is shown to be fully met by which the undivided profits are rendered taxable. That this fund shall not be drawn on and consumed during the year is not required by the statute. To add to this additional qualification would be legislation and not construction. That the word "undivided" shall be interpreted to signify "unex-

pended," as contended for in the plaintiff's brief, would be a violation of the expressed intent of the legislature. That the railroad company did not formally enter in its books any portion of its assets as construction fund, does not relieve it from the taxation that the law imposes.

G. A. JENKS,
Solicitor-General.

In the Supreme Court of the United States.

OCTOBER TERM, 1887.

GEORGE W. RADFORD, Assignee, &c.,
vs.
AGNES FOLSOM, et al.
} In Equity. No. 763.

MOTION TO DISMISS.

In the above entitled cause it is hereby stipulated that the following are the facts, as shown by the Transcript of the Record filed herein, material to the appellee's motion to dismiss the appeals, to wit:

1. The first decree made and entered of record by the Circuit Court in this cause was made at the March Term, 1884, on April 2, 1884. It is called, in the record, an interlocutory decree. The suit was one to foreclose a mortgage securing a number of alleged debts. As to the principal alleged debt, and some others, this decree dismissed the plaintiff's bill upon the merits at plaintiff's costs. As to some other of said alleged debts, and as to matters contained in defendant's cross bill, the cause was referred to a master to find certain matters and state certain accounts. The complainant on the same day, April 2, 1884, prayed an appeal to this Court which was allowed on the same day.

2. The second and last decree was rendered on the incoming of the Master's Report, October 10, 1885, and after over-ruling exceptions thereto, and was among other things, a decree against complainant for $14,084.77. The next term of this Court thereafter, commenced October 12, 1885.

In said last decree, among other things is the following:

"And the complainant prays an appeal from the foregoing decree, which appeal is by the Court hereby allowed.

"And the penalty of the appeal bond, if the same is to operate as a supersedeas is fixed at dollars, but if the same is not to operate as a supersedeas then the penalty of the appeal bond is fixed at dollars."

3. February 8, 1886, there was filed in the office of the clerk of the Circuit Court, in said cause, an order made by Hon. James M. Love, one of the Judges of said court, fixing the amount of said appeal bond at $20,000, if for supersedeas, and at $2,000, if for costs only. Said order was made after the September Term, 1885, of the Court had terminated, and is dated at Chambers, at Keokuk, Iowa, January 29, 1885. This is probably a mistake as to the year, and should be 1886.

4. March 27, 1886, complainant filed motion and petition to modify amount of appeal bond.

5. June 8, 1886, pending said motion and petition, complainant filed with the clerk of said Circuit Court, an appeal bond, dated March 1, 1886, in the penal sum of $25,000, in accordance with said order of February 8, 1886, which bond had been approved by Judge Love, as a supersedeas bond.

6. October 2, 1886, said motion and petition to modify amount of appeal bond were over-ruled by the Court, on the ground that the case was then in the Supreme Court of the United States.

7. No transcript of the record, under either of said appeals, was ever filed in this Court; nor was this cause ever docketed in this Court, under either of said appeals, until October 15, 1886.

The record is very voluminous, containing nearly 2000 folios.

December 6, 1887.

H. H. TRIMBLE and
JOSEPH G. ANDERSON,
Counsel for Appellee.

W. F. SAPP and
WALTER H. SMITH,
Attorneys for Appellant.

123-725

FILED
DEC 8 1887
JAMES H. McKENNEY
CLERK

In the Supreme Court

OF THE UNITED STATES.

OCTOBER TERM, 1887.

George W. Radford, assignee in bankruptcy of the estate and effects of Simeon Folsom and Frank Folsom, bankrupts.

Appelant.

vs.

Agnes Folsom, administratrix of the estate and effects of Jeremiah Folsom, deceased Jonas B. Blake, administrator, *de bonis non* of the estate and effects of Sarah M. Folsom, deceased, Agnes Folsom, Adele Folsom, Florence Folsom, George B. Folsom, Ward P. Folsom. Jonas B. Blake, guardian of Adele Folsom, Florence Folsom, and George B. Folsom, minors. Agnes Folsom, guardian of Ward P. Folsom, minor, Samuel F. Folsom, Rachael L. Folsom, Lewis W. Ross, Zoe M. Ross, Edward W. Davenport, assignee in Bankruptcy of the estate and effects of Samuel F. Folsom, a bankrupt, and A. S. Bryant.

Respondents.

In Equity.

No. 763.

The motion of the respondents to dismiss the appeals and argument thereon.

Now come the respondents above named and respectfully represent to the court as follows, to wit:

That there were two decrees made by the Circuit Court in the above entitled cause, namely: 1. One at the March term, 1884,

on April 2, 1884. 2. One at the September term, 1885, on the tenth day of October, 1885. In the first decree the bill was, as to the major part of the matters in controversy, dismissed upon the merits at plaintiff's cost. In so far it was a final decree, and the complainant on the same day, April 2, 1884, prayed an appeal to this court which was allowed on the same day. No transcript of the record was filed in this court under this appeal until October 15, 1886, and it was not docketed here until October 15, 1886.

In the second decree all that remained of the bill was dismissed at plaintiff's cost, and there was a decree in favor of the defendants upon a cross bill. From this decree, also, the complainant, on the day it was made, October 10, 1885, prayed an appeal to this court which was on the same day allowed. No transcript of the record under this appeal was filed until October 15, 1886; nor was this appeal docketed until October 15, 1886.

Wherefore the respondents move the court to dismiss each of said appeals for the following reasons, to wit:

First. Because neither of said appeals have been duly prosecuted.

Second. Because each of said appeals became null and void when the return term of this court passed without a transcript of record being filed in this court and the cause being docketed herein.

Third. Because this court has no jurisdiction of either of said appeals.

H. H. TRIMBLE,
JOSEPH G. ANDERSON,
FRANK HAGERMAN,
Solicitors and Counsel for Respondents.

ARGUMENT.

Where an appeal is taken to this court, the transcript of the

record must be filed and the case docketed at the term next succeeding the appeal.

Edmonson vs. Bloomshire, 7 Wall., 306, 309, 310.
Hamilton vs. Moore, 3 Dallas, 371, 377.
Blair vs. Miller, 4 Dallas, 21.
Villabolis vs. United States, 6 How., 81, 90.
Steamer Virginia vs. West, 19 How., 182, 183.
Mesa vs. United States, 2 Black, 721, 722.
Castro vs. United States, 3 Wall., 46, 49, 50.
Mussina vs. Cavazos, 6 Wall., 355, 358.
The Lucy, 8 Wall., 307, 309, 310.
The S. S. Osborn, 105 U S., 447, 451.
Hilton vs. Dickinson, 108 U. S., 165, 168.
The Tornado, 108 U. S., 110, 117.
State vs. Demarest, 110 U. S., 400, 401.
Killian vs. Clark, 111 U. S., 784.
Caillot vs. Deetken, 113 U. S., 215, 216.

We shall not undertake to state at length all the cases above cited. It will suffice to refer specially to one of them.

Edmonson vs. Bloomshire, 7 Wall., 306, 309, 310, was a case where the transcript was not filed during the term next succeeding the allowance of the appeal, but it was filed afterwards. The case, when reached, having been fully argued on the merits by counsel on both sides, it was suggested from the bench that doubts were entertained by it as to the jurisdiction of the court. It was then argued in support of the jurisdiction by Mr. Stanberry for the appellant. The court dismissed the appeal because the transcript was not filed during the term next succeeding the allowance of the appeal. Mr. Justice Miller delivered the opinion of the court. He said: "In the cases of Villabolos vs. United States, and United States vs. Curry, decided at the December Term, 1887, and especially in the latter case, it was held, on full consideration, that whether a case was attempted to be brought to this court by writ of error, or appeal, the record must be filed before the end of the term next succeeding

the issue of the writ or the allowance of the appeal, or the court has no jurisdiction of the case. This was repeated in the Steamer Virginia vs. West, Mesa vs. United States and United States vs. Gomez.

"In Castro vs. United States, the same question was raised. The importance of the case, together with other considerations induced the court to consider the matter again at some length. Accordingly the present Chief Justice delivered an opinion, in the course of which the former cases are considered and the ground of the rule distinctly stated.

"Other cases followed that, and in Mussina vs. Cavazos decided at the term, the whole doctrine is again reviewed, and the rule placed distinctly on the ground that this court has no jurisdiction of the case unless the transcript be filed during the term next succeeding the allowance of the appeal. The intelligible ground of this decision is, that the writ of error and the appeal are the foundations of our jurisdiction, without which we have no right to revise the action of the Inferior Court; that the writ of error, like all other common law writs, becomes *functus officio* unless some return is made to it during the term of court to which it is returnable; that the act of 1803, which first allowed appeals to this court, declared that they should be subject to the same rules, regulations and restrictions, as are prescribed in law, in writs of error. These principles have received the unanimous approval of this court, and have been acted upon in a large number of cases not reported, besides several important cases not here mentioned. And the court has never hesitated to act on this rule whenever it has appeared from the record that the case came within it, although no motion to dismiss was made by either party. In fact treating it as a matter involving the jurisdiction of the court, we cannot do otherwise.

"In the case of United States vs. Curry, Chief Justice Taney, answering the objection that the rule was extremely technical,

replied, that nothing could be treated by this court as merely technical, and for that reason be disregarded, which was prescribed by congress as the mode of exercising the court's appellate jurisdiction. We make the same observation now, and add, that it is better, if the rule is deemed unwise or inconvenient, to resort to the legislature for its correction, than that the court should depart from its settled course of action for a quarter of a century."

The other cases above cited show that this rule continues to be acted upon by this court, and it is now as well settled as any rule can be.

The application of this rule to the facts stated in the motion is plain. As to the first appeal taken April 2, 1884, over two years and six months, covering two full terms, elapsed before the appeal was docketed and the transcript filed. As to the second appeal, over a year, covering the whole of the term of this court next succeeding the making of the decee and the allowance of the appeal, and some days of the beginning of the second term, elapsed before the appeal was docketed and the transcript filed. The decree was made and the appeal was allowed, October 10, 1885. The next succeeding term of this court began October 12, 1885. The appeal is subject to the same rules, regulations and restrictions as are prescribed in law in cases of writs of error. Rev. Stat. U. S., Sec. 1012. If it had been a writ of error, being less than thirty days before the October term, 1885, it would have been returnable on the third Monday of that term. Rule, VIII, Sec. 5 So too, by Rule IX, Sec. 1. the decree having been rendered and the appeal taken less than thirty days before the term, it was the duty of the "appellant to docket the case and file the record thereof with the clerk of this court within the first thirty days of the term" Under this rule the transcript of the record should have been filed in this court before November 12, 1885. It was not filed then or at any time during the October term 1885, and

not until October 15, 1886. It was then too late as to both appeals and both should be dismissed.

Respectfully submitted.

H. H. TRIMBLE,
JOSEPH G. ANDERSON,
FRANK HAGERMAN,
Counsel for Respondents.

123-725

DEC 8 1887
JAMES H. MCKENNEY
CLERK

In the Supreme Court of the United States.

OCTOBER TERM, 1887.

GEORGE W. RADFORD, Assignee, &c.,
vs.
AGNES FOLSOM, et al.

In Equity. No. 763.

ON MOTION TO DISMISS APPEALS.

ARGUMENT IN REPLY.

I.

AS TO THE FIRST APPEAL.

1. In their argument counsel for appellant make the point that the first decree was not a final decree, and therefore not appealable. If this be so the motion to dismiss this appeal must be sustained.

2. The first decree, of April 2, 1884, was, however, in part, a final decree. The suit was a foreclosure suit for several distinct and independent debts. As to the principal debt this decree dismissed the plaintiff's bill, upon the merits, at plaintiff's cost. In so far, it was final. An execution might have issued at once against the plaintiff thereon for costs, and it is expressly so directed in the decree. It finally and forever disposed of the claim of the complainant against the defendants upon the principal alleged debt, and nothing remained to be done in the cause as to such alleged debt. The fact that as to other separate, distinct and independent causes of action joined with this in the same bill there was not a final adjudication,

does not alter or affect the final character of this decree as to the alleged principal debt. As that distinguished jurist, Benjamin R. Curtis, says: "When a judgment at law is rendered on which execution can issue, that is final; when the execution is put in force, that may deprive the party of his money."

Curtis on United States Courts, 74.

He also states the same rule as to decrees in equity. He says: "A decree in equity may be final without being complete. If it deprives the defendant of his property, or his money, finally, so far as regards that court, then he may appeal, although there remain certain things to be done in the case before it will be ended. * * * The decree may be final without being complete; as, for instance, suppose a court of equity should require the defendant in a case to hand over the title deeds, or any other property for which the suit was brought, because the complainant is entitled to them, or because it adjudicates that he has a right to them, and it requires the respondent in equity to execute or give effect to that right, and pass the property over to his opponent, that is a final decree, although there may remain many things to be done in the cause."

Curtis on United States Courts, 77, 78;
Forgay *v.* Conrad, 6 Howard, 201, 203, 204;
Thompson *v.* Dean, 7 Wallace, 342, 345, 346;
Stovall *v.* Banks, 10 Wallace, 583, 586.

We submit that the first decree was a final decree and that the appeal therefrom should be dismissed for the reasons set forth in our former argument.

II.

As to the Second Appeal.

The point, as we understand it, made by counsel for appellant as to this appeal, is that this appeal was not perfected until the security had been accepted. The cases cited by counsel upon this proposition are not in point as to the question of the

time when a transcript must be filed in this court. Neither do they throw any light on the question as to when an appeal is considered as taken. The prior and subsequent decisions of this court show that the appeal is taken, and is a valid appeal, when it is allowed by the court, and that the transcript must be filed at the next term of this court, or it is too late.

Edmonson *v.* Bloomshire, 7 Wallace, 306, 311, is precisely in point. In that case the transcript was filed in this court at the *next term* after the *appeal bond* was filed and approved, but not at the *next term* after the *appeal was allowed*. Miller, J., delivering the opinion of the court, said: "Two grounds are assigned as taking the case out of the rule we have stated.*

"1. It is said that the appeal of 1860 was not perfected until the bond was given under the order of November 14, 1865, and that until this was done there was in fact no appeal which required the transcript to be filed.

"The answer to this is, that the prayer for the appeal, and the order allowing it, constituted a valid appeal. The bond was not essential to it. It could have been given here, and cases have been brought here where no bond was approved by the court below, and the court has permitted the appellant to give bond in this court.† In the case of Seymour *v.* Freer,‡ the Chief-Justice says, that if, through mistake or accident, no bond or a defective bond had been filed, this court would not dismiss the appeal, but would permit a bond to be given here. And in all cases where the Government is appellant, no bond is required. It is not, therefore, an indispensable part of an appeal that a bond should be filed; and the appeal in this case must be held as taken on the 26th day of May, 1860. * * *

"The bond may be given with effect at any time while the appeal is alive. There is no question made in the present case about the appeal being taken within time. It was taken in

---

*Namely the rule that the transcript must be filed at the next term after the appeal is taken or the appeal becomes void.

†Ex parte Milwaukee R. Co., 5 Wallace, 188.

‡5 Wallace, 822.

time. But the record was not filed in the court in time to save the appeal."

The second point made was that the order allowing the giving of the bond constituted a new appeal, but it was distinctly held by the court that the order made allowing the giving of bond and the actual giving of bond in pursuance thereof did not constitute a new appeal.

In Peugh *v.* Davis, 110 U. S., 227, 228, the case of Edmonson *v.* Bloomshire, 7 Wall., 306, was cited and followed upon the point that a prayer for appeal in open court, and an order allowing it, constituted a valid appeal, and that the bond was not essential to the taking of the appeal. It was also pointed out that in the prior decisions of this court the words "perfected" and "taken" were used interchangeably and were evidently intended to mean the same thing as "allowed."

So it has been held that where the appeal was allowed by the court while in session and acting judicially, at the term at which the decree was rendered, it constituted a valid appeal of which the appellee was bound in law to take notice; and that neither a bond or citation was essential to the appeal or to the jurisdiction of this court.

Dodge *v.* Knowles, 114 U. S., 430, 438.
Railroad Co. *v.* Blair, 100 U. S., 662.

The order for a supersedeas bond by Judge Love, January 29, 1886, and the approval of a supersedeas bond by him subsequently, cannot affect the question as to when the appeal was taken and completed in this case, because this was all *more than sixty days* after the decree. The decree was rendered October 10, 1885; sixty days thereafter would expire at latest, December 10, 1885. The Judge of the Circuit Court had no power to take security to operate as a supersedeas after sixty days, although a justice of this court would have had such power,

but even that would only be in case the appeal was taken or perfected within sixty days.

Revised Statutes U. S., Sec. 1007.
See Kitchen *v.* Randolph, 93 U. S., 86.
Sage *v.* R. Co., 93 U. S., 412, 416, 417.

It follows tnat the transcript was filed too late and that both appeals should be dismissed.

Respectfully submitted,

H. H. TRIMBLE,
JOSEPH G. ANDERSON,
Counsel for Appellees.